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9 Attorneys for Defendant
10 SERCO, INC.

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA ex
14 rel. DARRYN KELLY,

15 Plaintiff,

16 v.

17 SERCO, INC., a New Jersey corporation;
and DOES 1-5,

18 Defendants.
19

Case No. 11-CV-2975-WQH-RBB

20 **SERCO, INC.'S NOTICE OF**
21 **MOTION AND MOTION FOR**
22 **SUMMARY JUDGMENT OR, IN**
23 **THE ALTERNATIVE, PARTIAL**
24 **SUMMARY JUDGMENT**

DATE: May 19, 2014

TIME: 11:00 a.m.

COURTROOM: 14B

JUDGE: Hon. William Q. Hayes

25 [Documents Concurrently Filed:
26 Memorandum of Points and
27 Authorities; Separate Statement of
Undisputed Facts; Declaration of
Daniel P. Wierzba; Declaration of
Kent D. Brown; Declaration of
Suzette Mankel; Declaration of Alice
Hammond; Declaration of Robert A.
Burton; Declaration of Denise
Ellison; Declaration of Francisco
Magana; Motion to File Exhibits
Under Seal; Proposed Order on
Motion to File Exhibits Under Seal]

28 **NO ORAL ARGUMENT UNLESS**
REQUESTED BY THE COURT

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 19, 2014, at 11:00 a.m., or as soon as the parties may be heard, in Courtroom 14B, of the above-entitled court, located at 333 West Broadway, San Diego, California 92101, Defendant Serco, Inc. (“Serco”) will and hereby moves the Court for summary judgment, or, in the alternative, partial summary judgment, as to all of Plaintiff/Relator Darryn Kelly’s (“Relator”) claims under Federal Rules of Civil Procedure 56(a) on the grounds that Relator has not and cannot establish one or more of the essential elements of his claims for false claims, false records, unlawful retention of overpayments, conspiracy to submit false claims, unlawful retaliation, unlawful retaliatory discharge, termination in violation of public policy, and breach of contract of continued employment, there is no genuine issue as to any material fact, and Serco is entitled to judgment as a matter of law.

In the alternative, Serco hereby moves this Court for an order granting partial summary judgment pursuant to Federal Rules of Civil Procedure 56(a) and (g), as to the following claims and issues:

1. Relator has no claim for false claims under 31 U.S.C. § 3729 (a)(1)(A) because the activities he claims were fraudulent were not tied to any invoices that Serco submitted for payment, the activities he complained about did not violate any federal rule, statute or regulation, Serco did not certify (express or implied) compliance with any earned value management requirements to receive payment from the U.S. government, and the U.S. government had full knowledge of and in some instances directed Serco’s activities;

2. Relator has no claim for false records under 31 U.S.C. § 3729 (a)(1)(B) because there is no evidence that Serco falsified any records, the activities he claims were fraudulent were not tied to any invoices that Serco submitted for payment, the activities he complained about did not violate any federal rule, statute or regulation, Serco did not certify (express or implied)

1 compliance with any earned value management requirements to receive payment
2 from the U.S. government, and the U.S. government had full knowledge of and in
3 some instances directed Serco's activities;

4 3. Relator has no claim for retention of overpayments under 31 U.S.C.
5 § 3729 (a)(1)(G) because there is no evidence that Serco owed the U.S.
6 government any money or owed a duty to pay the U.S. government;

7 4. Relator has no claim for conspiracy under 31 U.S.C. § 3729 (a)(1)(C)
8 because there is no allegation or evidence that Serco entered into an agreement
9 with anyone to conspire to submit false claims or acted in furtherance of any such
10 agreement, and, even if there was evidence of any agreement, Relator's claim is
11 barred by the intra-corporate conspiracy doctrine;

12 5. Relator has no claim for unlawful retaliation under Cal. Gov. Code
13 § 12653 because his allegations all concern the federal False Claims Act, 31 U.S.C.
14 § 3729, whereas Cal. Gov. Code § 12653 only concerns alleged false claims
15 against California state or local government entities, and there is no evidence that
16 Relator engaged in any protected conduct, that Serco was aware he was engaging
17 in protected conduct, or that Serco retaliated against Relator for protected conduct;

18 6. Relator has no claim under Cal. Labor Code § 1102.5 because there is
19 no evidence that he engaged in protected conduct or a causal connection between
20 his termination and his protected conduct; the evidence instead shows that Serco
21 had a legitimate, non-discriminatory reason for laying off Relator when the U.S.
22 government, Serco's customer, reduced and then eliminated Relator's job function;

23 7. Relator has no claim for wrongful termination in violation of public
24 policy because it is entirely derivative of Relator's statutory discrimination claims
25 under Cal. Gov. Code § 12653 and Cal. Labor Code § 1102.5, and it fails when
26 those statutory claims fail; and

27 8. Relator has no claim for breach of contract of continued employment
28 because the evidence shows that he was at all times an at-will employee.

1 This Motion is based on this Notice of Motion and Motion; Separate
 2 Statement of Undisputed Facts, Memorandum of Law in Support of this Motion;
 3 Declaration of Daniel P. Wierzba, Declaration of Kent D. Brown, Declaration of
 4 Suzette Mankel, Declaration of Alice Hammond, Declaration of Robert A. Burton,
 5 Declaration of Denise Ellison; Declaration of Francisco Magana, Motion to File
 6 Exhibits Under Seal, and Proposed Order on Motion to File Exhibits Under Seal,
 7 all filed concurrently herewith, as well as all pleadings and documents on file
 8 herein, and upon such other and further oral and written materials as may be
 9 presented at or before any hearing on this matter.

10 Serco is not requesting oral argument on this motion, and appearance will
 11 not be required by the Court unless the Court notifies the parties otherwise.

12 For the reasons set forth in this motion, and the accompanying supporting
 13 information, Serco respectfully moves this Court enter summary judgment in its
 14 favor, or, in the alternative, partial summary judgment on each of Relator's Counts
 15 in his First Amended Complaint, dismiss Relator's First Amended Complaint with
 16 prejudice, and award Serco such other relief as this Court deems appropriate.

17
 18 DATED: April 21, 2014

Respectfully submitted,
 FOLEY & LARDNER LLP

21 By: /s/ Francis J. Burke, Jr.
 22 Francis J. Burke, Jr.

23 SEYFARTH SHAW LLP

25 By: /s/ Daniel P. Wierzba
 26 Daniel P. Wierzba
 27 Attorneys for Defendant
 28 SERCO, INC.